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Snepp's defense begins by citing the government's admission that his book did *not* reveal "classified information or any information concerning intelligence or the CIA that has not been made public by the CIA." Therefore, Snepp did not violate the second of the two secrecy agreements he signed with the agency. The first, in 1968, when he joined, covered "any information or material relating to the Agency." The second—and therefore the current, superceding—agreement, signed in 1976 when Snepp left, covers only "classified information" and material "that has not been made public by the CIA."

With regard to Snepp's having stomped on his "fiduciary" duty to the CIA, the government is basing its argument, by analogy, on the already court-tested obligations of employees to protect their employers' trade secrets. But in Snepp's case, the government has already conceded that he has revealed no secrets. So the "fiduciary" argument does not apply in this suit.

Furthermore, even in the Marchetti case, the Court of Appeals held that "the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy agreements upon its employees and enforce them with a system of prior censorship. *It precludes such restraints with respect to information which is unclassified or officially disclosed.*"

Snepp and the ACLU also claim, it should be emphasized, that in addition, "the First Amendment prohibits a governmental system of prior restraint of *classified* information, except where the government can meet the very heavy burden of justification articulated in *New York Times v. United States*, 1971. (That is, for example, when the nation is at war and the government, as stated in *Near v. Minnesota*, moves to "prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.")

This part of Snepp's argument, however, has to be held in abeyance because the Court of Appeals in the Marchetti case disagreed with this claim, and Snepp's lower court battles are being fought in that same Fourth Circuit. But Snepp has placed the full First Amendment argument in the record in the event his case is reviewed by the Supreme Court.

Among the other arguments Snepp and the ACLU are advancing is the contention that there is no evidence that *Decent Interval* has damaged national security—despite the government's claim that the book has undermined "confidence and trust in the agency, thereby hampering the ability of the agency and the Director of Central Intelligence to perform their statutory duties."

During discovery procedures, Snepp's lawyers emphasize, the government was unable "to identify any concrete or particular injury resulting from defendant's failure to submit his manuscript for pre-publication review."

But what if the CIA *could* produce a clear, specific example of *Decent Interval* having damaged "confidence and trust" in that agency which so far, of course, has been beyond reproach? Even if there were such an example, say Snepp's lawyers, "In this country, there are no limits to the peaceful criticism which citizens can level at their government."

On the basis of these and other arguments, Snepp moved for summary judgment. An earlier motion to that end by the government had been denied. On May 12, Snepp too failed to avoid trial. And so, a free-speech and free-press battle of great and perilous consequence has moved from the planning papers

into the arena. And this time, those who would do fierce injury to what James Madison and his colleagues constructed are not Nixon and Mitchell but Carter and Griffin Bell.

As Frank Snepp puts it, *this* White House and *this* Justice Department "are going way beyond the Pentagon Papers precedent and the Marchetti precedent and are seeking to punish me for having published unclassified material, an incredible extension of the government's assault on the First Amendment."

Coming from a president whose attorney general has proclaimed the 1978 Federal Criminal Code Reform Act (which contains much more massive assaults on the First Amendment) his top legislative priority, the Carter administration's pursuit of Snepp's free speech rights is not so incredible after all.

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